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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-324

THOMAS G. McCREA, Judge, Superior Court of Snohomish County, State of Washington,
Petitioner,
v.
SAM SPERRY and DEE NORTON,
Respondents.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Respondents do not believe the statement of the Questions Presented by petitioner accurately reflects the issues fairly raised by the petition to this court. The only question presented is, in the words of the opinion below (79 Wn.2d 69, 75):

> ". . . [w]hether a newspaper may constitutionally be proscribed in advance from reporting to the public those events which occur during an open and public court proceeding."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions cited by petitioner, the respondents cite Article I, Section 5 of the

Washington Constitution, providing:

> *Freedom of Speech.* Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

and Article I, Section 10 of the Washington Constitution, providing:

> *Administration of Justice.* Justice in all cases shall be administered openly and without unnecessary delay.

STATEMENT

The respondents accept the statement in the petition of the basic facts in the action, so far as it goes. Additionally, however, the respondents point out that at the time the jury was selected and empaneled to hear the pending criminal trial, it was instructed by the trial judge, in part, as follows:

> * * * *
>
> Do not read, view or listen to any report in a newspaper, radio or television on the subject of this trial or any other criminal trial. Do not permit anyone to read or comment on this trial or any criminal trial to you or in your presence.
>
> During the course of this trial, do not read, view or listen to any report in a newspaper, radio or television on the subject of crime or sentences which result from a criminal conviction. Similarly, do not engage in any conversation with regard to such subjects and do not permit such a conversation to be carried on in your presence.
>
> * * * *

The full text of the trial court's cautionary instruction to the jury is reproduced as Finding of Fact II, appearing in the petition at pages 44 and 45, of Appendix D.

At no time, either prior to the hearing on the con-

tempt citation, coincident therewith, or thereafter, was an attempt made to question the members of the jury, either individually or as a panel, as to whether any of them were even aware of the existence of the newspaper article in question, much less whether any had read it or knew of its content. No finding of prejudice to the pending criminal proceeding, actual or implied, has been made.

REASONS WRIT SHOULD NOT BE GRANTED

No Substantial Federal Question is Presented

Although respondents concur with the petitioner that the issues involved are substantial and significant, the only question as to their resolution is in the petitioner's mind. The petition seeks to raise a conflict between the opinion of the Washington Supreme Court and this court's decisions interpreting the United States Constitution where no such conflict exists.

The petition is premised upon an assumption that *Sheppard v. Maxwell*, 384 U.S. 333 (1966), "directs" the exercise by the trial court of the censorship attempted here, *after* the trial has begun and the jury has been selected and subjected to the court's cautionary instructions. The respondents submit that *Sheppard* supports no such construction. The trial court here sought to restrain members of the news media beyond all permissible limits, and in direct contravention of the *Sheppard* mandate itself.

Respondents concede that the quotations from the *Sheppard* opinion set forth in the petition accurately reflect the opinion of this court as to the issues there involved, being the potentially prejudicial effect of massive pretrial publicity prior to the selection of jurors from the community at large, and the power of a trial judge to control his court-

room during the prosecution of the charge, once under way. However, petitioner omits reference to another portion of the *Sheppard* opinion, far more relevant to the issue sought to be raised before this court. As is reported at 384 U.S. 333, 362-363:

> "*Of course, there is nothing that proscribes the press from reporting events that transpire in a courtroom.* But where there is a reasonable likelihood that prejudicial news *prior to trial* will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . *If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.* . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither *prosecutors, counsel for defense, the accused, witnesses, court staff, nor enforcement officers coming under the juridsiction of the court* should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censorable and worthy of disciplinary measures." (Emphasis added)

At no time has it been suggested, nor can it constitutionally so be, that censorship of the press may now be had in the interests of justice. The Constitution has not and never will support such a restriction; to rule otherwise would be to undercut the very foundation of the first amendment.

The ruling of the Washington Supreme Court in this case is wholly consistent with an unbroken line of precedent. In *Craig v. Harney*, 331 U.S. 367 (1947), it is said, at 374:

> "A trial is a public event. What transpires in a courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perrequisite of the judiciary which en-

> ables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events that transpire in proceedings before it."

Likewise, in *Estes v. Texas,* 381 U.S. 532 (1965), handed down within a year prior to the *Sheppard* decision, at 540, 541-542:

> [Reporters] are entitled to the same rights as the general public. . . .
>
> * * * *
>
> It is true that the public has the right to be informed as to what occurred in its courts, but reporters of all media, including television, are always present if they wish to be, and are plainly free to report whatever occurs in open court to their respective media. This was settled in *Bridges v. California,* 314 U.S. 252, 86 L.Ed. 192, 62 S.Ct. 190, 159 A.L.R. 1346 (1941), and *Pennekamp v. Florida,* 328 U.S. 33, 90 L.Ed. 1295, 66 S. Ct. 1029 (1946) which we reaffirm.

It is patent that the trial court was constitutionally in error in his order, and that he is proscribed from prior restraints on the press in the reporting of courtroom proceedings. No purpose would be served by a further ruling to the same effect.

The Posture of This Case Does Not Justify Further Review

Even if this court wished to accept petitioner's premise that hitherto impermissible prior restraints on publication of courtroom proceedings were now constitutional, such a ruling could only be based on a finding of prejudice to the pending proceeding. Such prejudice is non-existent here. At no time has it been shown or even attempted to be discovered whether any member of the jury knew of the existence of the article, much less read it, was influenced by it, or communicated its contents to others

who were. As pointed out in the concurring opinion of Judge Finley of the Washington Supreme Court, appearing at page 33 of Appendix A to the petition:

> We would be presented with quite a different matter had the instant contempt adjudication involved and had been based upon allegations concerning post-publication results of appellants' actions, *i.e.*, contamination of the jury verdict and post-publication accountability.

A prior restraint must be narrowly drawn, for the limitations imposed cannot be greater than is necessary to accomplish the desired constitutional purpose. *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir., 1970). The rationale of the trial court was to protect the members of the jury from access to prejudicial material during the pendency of the criminal proceedings. Indeed, the judge had previously ordered the members of the jury not to read or view any account of the pending proceeding, which admonition was couched in the strongest terms. Yet the court apparently held little faith in the ability of the jury to observe its instructions, for the court's October 8 order here sought to be reviewed serves to isolate not only the jury, but the community at large, from a proceeding in which it had a legitimate interest.

Respondents reject any implication or assertion that the trial bench in the State of Washington will feel constrained in imposing proper limiting orders upon the new media during criminal trials, as proposed in the petition. No restriction on the mandate of *Sheppard* can be read into the instant case, and there is no indication that the lower court's decision here or those decisions cited in the petition from New York, Arizona and Nevada, among others,

have in any way foreclosed the trial bench from adequate control of cases pending before it. The power to regulate *conduct* of news media in the interests of ensuring a fair and impartial trial is not in jeopardy by this case. *Content,* however, is and always has been an impermissible subject of court control.

The petitioner argues that the interest of the public was fully served by this order, as the public was never excluded from the courtroom. With this the respondents must take issue, as the press has never been considered separate from the public which it represents. *Estes v. Texas, supra; Azbill v. Fisher,* 84 Nev. 414, 442 P.2d 916 (1968), *Oxnard Publishing Co. v. Superior Court of Ventura County,* 261 Cal. App.2d 505, 68 Cal. Rptr. 83 (C.A. 2d Dist., 1968). To limit the publication by the media of even minor elements of the trial contravenes the rights of the public at large in overseeing the conduct of the court proceedings. To so restrict the press when "the sole motivation was to protect the jury from information which they admittedly should not receive" (petition, page 11) is patently unreasonable. That members of the public other than the press were not restrained from open discussion of all facts of its proceeding is no answer, but rather gives rise to an additional ground in support of the result. There can be no rational basis for distinguishing one from another, for, as often said, they are the same.

The petition raises one issue with respect to the right of the respondents to raise the constitutional arguments in an appeal from the contempt citation; however, this issue is not further argued. We would suggest that this issue is

not fairly before this court, as its determination rests upon the application of a narrow procedural rule, decided contrary to the petitioner in the court below.

In the application of the local rule, the lower court did not deviate from established Washington precedent in finding the order in question void as having been entered in excess of the power or jurisdiction of the trial court, and therefore subject to attack on appeal. See *State v. Lew*, 25 Wn.2d 854, 172 P.2d 289 (1946). Further, and as pointed out in the special concurring opinion of Judge Rosellini in the instant case, the respondents were never properly parties to the principal criminal action being conducted at the trial level and had, prior to the finding of contempt itself, no standing on which to seek review of the order for violation of which they were found in contempt.

CONCLUSION

This court should not grant the requested writ of certiorari as the interests of justice would not be furthered by additional review. The Washington Supreme Court decided the constitutional issues strictly in accordance with the prior opinions of this court and of the several state courts which had previously considered the issue in question. No suggestion can be entertained that it did otherwise. The petitioner seeks to raise a substantial federal question where none exists, and would have this court break new ground at the expense of the historical rights of the public to have reports of open court proceedings. In a proper case, the issues sought to be raised might be

considered, but there is no merit in asserting that this case is appropriate for this purpose. The issue here is a very narrow one, and limited to the facts at hand.

Respectfully submitted,

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